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No. 08-681

IN THE
Supreme Court of the United States

JEAN MARC NKEN,
Petitioner,
v.

MICHAEL MUKASEY,
UNITED STATES ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Congress intended that an alien's motion to prevent removal pending consideration of a petition for review should be governed by the standard set forth in 8 U.S.C. § 1252(f)(2), or instead intended to permit each federal appeals court to apply its own standard.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to promoting America's security. To that end, WLF has appeared before this Court and other federal courts to support the prompt deportation of aliens who enter or remain in the United States in violation of our law, thereby ensuring that those aliens do not take immigration opportunities that might otherwise be extended to others. WLF has also opposed efforts by federal courts to exercise jurisdiction over immigration matters that are properly the prerogative of the elected branches of government. *See, e.g., Clark v. Martinez,* 543 U.S. 371 (2005); *Demore v. Kim*, 538 U.S. 510 (2003); *INS v. St. Cyr,* 533 U.S. 289 (2001); *Reno v. American-Arab Anti-Discrimination Comm.* ("*AAADC*"), 525 U.S. 471 (1999).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties consented to the filing of this brief; copies of the letters of consent have been lodged with the Court.

law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Particularly in light of the significant national security concerns raised by immigration matters, *amici* believe that the courts should afford considerable deference to the political branches of government regarding the timing of removal of aliens determined to be present in this country without authorization. *Amici* are concerned that courts are undermining the effectiveness of immigration enforcement efforts when they routinely block removal while they are reviewing final orders of removal. As evidenced by this case, the ready availability of such delays frequently permits savvy attorneys to postpone indefinitely the deportation of their alien clients. *Amici* do not support removing aliens who qualify for asylum to countries where their lives will be endangered. *Amici* nonetheless believe that there are sufficient checks built into the system that such removals are highly unlikely even if courts abide by Congress's heightened standards for granting stays.

STATEMENT OF THE CASE

Petitioner Jean Marc Nken is a citizen of Cameroon who entered the United States on a transit visa in 2001 and, without authorization, has remained here ever since. Federal immigration authorities initiated removal proceedings against him in 2001. The Board of Immigration Appeals (BIA) issued a final order of removal in June 2006, affirming the decision of an Immigration Judge (IJ) to deny his applications for asylum and withholding of removal and his request for relief under the Convention Against Torture (CAT). J.A. 44-49. In April 2007, the U.S. Court of Appeals for

the Fourth Circuit denied his petition for review, upholding (as supported by "substantial evidence") the IJ's findings that Nken was ineligible for asylum, withholding of removal, and protection under the CAT. J.A. 51-54.

In the nearly three years since the final order of removal was issued, Nken has filed three separate motions with the BIA to reopen removal proceedings; all three were denied, and the Fourth Circuit has denied petitions for review with respect to the first two. This case involves Nken's third motion to reopen, filed in May 2008 and entitled, "Motion to Reopen (and Remand) Based on Recently Changed Country Conditions and New Evidence Not Previously Available." J.A. 58-64.

The BIA denied the third motion to reopen in June 2008. J.A. 70-73. The motion to reopen was procedurally barred unless Nken could demonstrate that his evidence of changed conditions in Cameroon was "material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. § 1229a(c)(7)(C)(ii).[2] The BIA determined that Nken had "not presented sufficient facts or evidence" to establish that he met the requirements of § 1229a(c)(7)(C)(ii) and thus denied the motion "as time and number barred." J.A. 71, 73. The

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[2] The general rule provides that an alien may file only one motion to reopen, and that the motion must be filed within 90 days of the final order of removal. 8 U.S.C. § 1229a(c)(7)(A) & (C)(i). However, those limitations do not apply to claims for asylum and withholding of removal that meet the requirements of § (C)(ii) set forth above in the text.

BIA specifically faulted Nken for failing to submit his own statement "articulating his persecution claim" and responding to the IJ's determination that Nken's prior testimony was not credible. J.A. 71.

Nken then petitioned the Fourth Circuit for review of denial of his motion. He also filed a motion to stay his removal pending review of the petition.[3] The Fourth Circuit summarily denied the motion in November 2008. J.A. 74. This Court granted review to determine the proper standard that a court of appeals should apply when considering a motion for stay of removal pending consideration of an alien's petition for review.

SUMMARY OF ARGUMENT

The text of 8 U.S.C. § 1252(f)(2) demonstrates that Congress intended it to supply the standard for judging motions for stay of removal pending consideration of petitions for review. It states unequivocally that unless the standard it sets forth is met, "no court shall enjoin the removal of any alien pursuant to a final order under this section." Under all commonly understood meanings of the word "enjoin," that provision is directly applicable to any request directed by an alien to a federal court to delay removal while the court considers a petition challenging a final removal order.

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[3] Nken styled his motion as a motion for "stay" pending appeal. As explained below, *amici* doubt that "stay" is the most appropriate term to describe the relief that Nken seeks. Nonetheless, for ease of understanding we adopt Nken's terminology.

Nken asserts that an order to "enjoin" removal is somehow different from an order to "stay" removal and thus that his motion to stay removal is not covered by § 1252(f)(2). But his effort to draw a "formal" distinction between "enjoin" and "stay" actually cuts against him. Nken asserts that an "injunction" is relief directed at a particular party, not a tribunal; while a "stay" is a tool used by a court to delay the impact of one of its own decisions or that of an inferior tribunal. Pet. Br. 21-22. Under that definition, "enjoin" best describes the relief that Nken seeks: his motion seeks to prevent immigration officials with the Department of Homeland Security (DHS) from taking an otherwise legal action (removing Nken from the country), not to stay the effect of an order from an inferior tribunal. Section 1252(f)(2) speaks of enjoining "the removal of any alien pursuant to a final order under this section" (*i.e.*, pursuant to a final order of removal), and the relief Nken seeks would do precisely that.

In any event, the "formal" distinction between "enjoin" and "stay" espoused by Nken is not recognized by the law. Both Congress and the courts regularly use the words "stay" and "enjoin"/"injunction" interchangeably, with a "stay" viewed as a subset of the more sweeping term "injunction." Given that history, there is no reason to assume that Congress intended to exclude "stays" (as Nken seeks to define the term) from the scope of § 1252(f)(2). To the contrary, such an intent is highly unlikely. Section 1252(f)(2) was adopted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546. IIRIRA abolished the prior standard governing stays pending appeal (which mandated that noncriminal aliens were entitled

to stays in all cases). Thus, § 1252(f)(2) can be deemed inapplicable to stays of removal only if one is willing to assume that Congress intended to abolish the prior standard without specifying what the new standard would be.

Each of the federal appeals courts that has refused to apply § 1252(f)(2) to stays of removal has instead judged stay motions based on that circuit's traditional standards governing the grant of preliminary injunctions. Reported § 1252(f)(2) opinions from those circuits well illustrate the wide disparity in the "traditional" standards that existed in 1996 and that continue to this day. It is difficult to believe that Congress, at the same time that it abolished mandatory stays, intended that an alien's stay application would be governed by the unique preliminary injunction standards of the circuit in which he happened to be located.

Moreover, stays of removal appear to be the *only* type of court action to which § 1252(f)(2) could conceivably apply. Thus, if § 1252(f)(2) is inapplicable here, then it has no application whatsoever; Congress should not be assumed to have adopted the provision for no apparent purpose.

Nken suggests that if § 1252(f)(2)'s somewhat stricter standard is applied to stays of removal, then at least some aliens with valid asylum claims will be removed to countries where they face great risk of persecution or death. But that risk exists regardless what standard is adopted, unless one reverts to the standard unequivocally rejected by Congress in 1996 – granting stays pending appeal to *all* aliens. More

importantly, there are numerous safeguards built into the system – before removal proceedings ever reach the courts – to minimize the danger that those with valid asylum claims will be ordered removed. One can reasonably assume that Congress concluded that it had taken sufficient steps to minimize that danger and that judicial intervention (in the form of stays of removal) was unnecessary in the absence of unusually strong evidence that DHS had erred.

Indeed, this Court has observed that the overriding theme of IIRIRA is a congressional desire to reduce judicial interference with good-faith decisions made by Executive Branch officials with respect to immigration matters. That theme recurs in later immigration-related legislation, particularly the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231. Congress has become painfully aware that overly generous judicial review provisions relating to immigration law can frustrate law enforcement efforts, by permitting illegal aliens to drag out the removal process for many years. As *AAADC* recognized, a court-imposed delay in removal is a victory for the alien; it "permits and prolongs a continuing violation of United States law." *AAADC*, 525 U.S. at 490. Reducing those delays by applying § 1252(f)(2)'s relatively strict standards to stay motions is entirely consistent with Congress's desire to prevent immigration enforcement efforts from being tied in knots.

Finally, there is no merit to the efforts of Nken and his supporting *amici* to invoke various rules of statutory construction to bias the interpretation of § 1252(f)(2) in his favor. Nken asserts that ambiguous statutes touching on removal should be construed to

favor the alien resisting removal. To the contrary, the guiding principle in construing an immigration statute or any other federal statute ought to be to arrive at an interpretation that best captures congressional intent. In light of Congress's repeated efforts to preserve Executive discretion in the enforcement of immigration law, there is little reason to conclude that Congress adopted those statutes with the intent that close cases should be decided in favor of the alien. The rule of statutory construction relied on by Nken – which is quite limited in nature and which has never been embraced as an actual holding of the Court – has no application here.

ARGUMENT

I. THE TEXT OF § 1252(f)(2) DEMONSTRATES THAT CONGRESS INTENDED IT TO APPLY TO STAYS OF REMOVAL PENDING CONSIDERATION OF A PETITION FOR REVIEW

Section 1252(f)(2), which was added to federal immigration law in 1996 as part of IIRIRA, provides in full:

> Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

Section 1252(f)(2)'s limitation on the authority of

federal courts is written in sweeping terms; it applies to the removal of *any* alien and notwithstanding *any* other provision of law. Nken's argument that the provision is inapplicable to a motion for stay of removal pending consideration of a petition for review hinges entirely on the word "enjoin." Nken asserts that a "stay" is wholly distinct from an "injunction" and that the failure to use the word "stay" in § 1252(f)(2) indicates that Congress did not intend the standard of review set forth therein to apply to his motion for a stay.

A. Nken Seeks To Prevent Immigration Officials From Removing Him From the Country, and Thus "Injunction" Is the Most Apt Description of the Relief He Seeks

Even if one accepts Nken's rather crabbed definitions of the relevant words, his argument still fails. Under those definitions, the relief sought by Nken can best be described as an injunction to prevent federal immigration officials from removing him while the Fourth Circuit considers his petition for review. Accordingly, § 1252(f)(2) must be deemed applicable even if one accepts Nken's claim that "stay" and "enjoin" have mutually exclusive definitions.

Nken asserts that an "injunction" is "a legal remedy that governs the conduct of a party to a legal proceeding." Pet. Br. 22. In contrast, he asserts that a "stay" refers only to "the 'postponement or halting of a proceeding, judgment, or the like' and '[a]n order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding.'" *Id.* (quoting *Black's Law Dictionary* 1453 (8th ed. 2004). Nken likens the

administrative proceedings before the IJ and the BIA to a judicial proceeding and asserts that a motion to postpone, halt, or suspend a final order of removal can properly be deemed a "stay" but is not an "injunction." *Id.*

A principal flaw in Nken's argument is that he has not asked for a "stay" of the final order of removal; rather, his has asked for a "stay of removal." His initial request to this Court was entitled, "Emergency Motion for a Stay of Removal Pending Adjudication of the Petition for Review." In other words, he is asking that federal immigration officials be prevented from removing him from the United States while he litigates his petition. As he has defined the terms "stay" and "injunction," Nken is asking for an "injunction" against those officials, not a "stay."

Nor is Nken's predicament a product of poor draftsmanship. The federal appeals courts lack the authority to "stay" final orders of removal in the same sense that they can "stay" their own orders or those of an inferior judicial tribunal. The authority of the appeals courts to review final orders of removal is carefully circumscribed by 8 U.S.C. § 1252. Indeed, the federal courts have no jurisdiction whatsoever to review significant portions of the immigration/removal process. For example, judicial review is generally unavailable from a decision by an immigration officer to remove an alien arriving in the United States and who is determined to be inadmissible. 8 U.S.C. § 1252(a)(2)(A). Similarly, judicial review is generally unavailable from a denial of relief from removal, where the relief requested is specified by statute to be in the discretion of immigration officials. 8 U.S.C. § 1252(a)(2)(B).

Furthermore, federal courts in most instances lack jurisdiction to review a final order of removal against an alien who is removable by virtue of having committed a major criminal offense. 8 U.S.C. § 1252(a)(2)(C). Given their limited jurisdiction to review final orders of removal, the federal appeals courts do not occupy a position vis-a-vis immigration-related administrative proceedings that they occupy with respect to federal district courts. They generally lack authority to dictate how the administrative tribunals are to proceed or what kind of orders they may issue. Accordingly, while in some instances they are empowered to prevent immigration officials from removing an alien when those officials have not acted in accordance with law, any such action more closely fits Nken's definition of an "injunction" than it does his definition of a "stay."

As this Court has noted, final orders of removal "are self-executing orders, not dependent on judicial enforcement." *Stone v. INS*, 514 U.S. 386, 398 (1995). Once such an order issues, federal immigration officials are legally empowered to take steps to effect a removal unless barred from doing so by a federal court order. Section 1252(f)(2) speaks of enjoining "the removal of any alien pursuant to a final order under this section" (*i.e.*, pursuant to a final order of removal), and the relief Nken seeks would do precisely that.

B. The Ordinary Meaning of "Enjoin" Includes Any Order Prohibiting Someone from Doing a Specified Act, and Thus Encompasses a Stay of Removal Pending Appeal

In any event, the "formal" distinction between

"enjoin" and "stay" espoused by Nken is not recognized by the law. Both Congress and the courts regularly use the words "stay" and "enjoin"/"injunction" interchangeably, with a "stay" viewed as a subset of the more sweeping term "injunction."

At the time that IIRIRA was adopted, *Black's Law Dictionary* defined "enjoin" as follows: "to require; command; positively direct. To require a person, by writ of injunction, to perform or to abstain or desist from, some act." *Black's Law Dictionary* 529 (6th ed. 1990). "Stay" was defined as:

> A stopping; the act of arresting a judicial proceeding by the order of a court. Also, that which holds, restrains, or supports. A stay is a suspension of the case or some designated proceedings within it. *It is a kind of injunction* with which a court freezes its proceedings at a particular point.

Id. at 1413 (emphasis added). As the Eleventh Circuit observed in its decision finding § 1252(f)(2) applicable to motions for a stay of removal, "their definitions and common usage show that the plaining meaning of enjoin includes the grant of a stay." *Bin Weng v. United States AG*, 287 F.3d 1335 (11th Cir. 2002). Thus, there is no reason to conclude that Congress, when it used the word "enjoin" in § 1252(f)(2), intended to exclude from the provision's purview any judicial action that could be deemed a "stay."

Indeed, it is quite clear that Congress did *not* have Nken's definition of "stay" in mind when it used that word in 8 U.S.C. § 1252(b)(3)(B). That provision,

also adopted as part of IIRIRA, provides that serving a petition for review "does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise."[4] Had Congress intended to use the word "stay" in Nken's sense, it would have said that serving the petition for review "does not stay the final order of removal." By referring to a "stay" of "removal" rather than to a "stay" of "a final order of removal," Congress must have been using the word "stay" as a synonym for "enjoin" – that is, it was referring to an order barring federal immigration officials from removing the alien pending consideration of the alien's petition for review.

Numerous federal statutes use the word "stay" in that same sense. For example, under the Bankruptcy Code many activities with respect to a debtor are automatically "stayed" by the filing of a bankruptcy petition. 11 U.S.C. § 362. The stay is an injunction against individuals, not against judicial proceedings; indeed many of the stayed activities (*e.g.*, repossession of the debtor's car) do not entail any sort of judicial proceeding. Other federal statutes use the words "stay" and "injunction" interchangeably. *See, e.g.*, the Anti-Injunction Act, 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a State court . . .").

This Court has similarly used the word "stay" to refer to an injunction directing an individual not to

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[4] Prior to adoption of IIRIRA in 1996, the rule had been the precise opposite: deportation was automatically stayed as soon as a petition for review was filed in a federal appeals court. *See* 8 U.S.C. § 1105a(a)(3) (1994).

engage in a particular action. For example, when the Court, in connection with habeas petitions filed by those on death row, orders State official not to execute the petitioner, it routinely refers to a "stay of execution." *See, e.g., Panetti v. Quarterman*, 127 S. Ct. 2842, 2856 (2007). When used in that sense, the Court is using the word "stay" as a synonym for "injunction"; the court is issuing an order directed at State officials that prevents an action rather than one that postpones a proceeding or judgment (either of its own or of an inferior tribunal).

In sum, when Congress provided in § 1252(f)(2) that "no court shall enjoin the removal of any alien pursuant to a final order under this section" unless the standards set forth in that provision are met, there is every reason to believe that Congress intended to regulate any judicial act whose effects fall within the commonly understood meanings of "enjoin" (*e.g.*, "to abstain or desist from some act"). A stay of removal pending consideration of the alien's petition for review quite clearly falls within that category.

C. The Only Rational Explanation for § 1252(f)(2) Is That Congress Adopted It in Order to Regulate Stays of Removal

Stays of removal appear to be the *only* type of court action to which § 1252(f)(2) could conceivably apply. Thus, if § 1252(f)(2) is inapplicable here, then it has no application whatsoever; Congress should not be assumed to have adopted the provision for no apparent purpose. *Teshome v. Mukasey*, 528 F.3d 330, 334 (4th Cir. 2008) (§ 1252(f)(2) is applicable to stays of removal because otherwise it would have no purpose; "we will

not construe a statute in a manner that reduces some of its terms to mere surplusage").

It is noteworthy that the appeals courts that have held § 1252(f)(2) inapplicable to stays of removal have given virtually no consideration to when § 1252(f)(2) might be applicable. *Amici* are unaware of any federal appellate decision that has applied § 1252(f)(2) outside the context of stays of removal. Nken misleadingly cites *AAADC* as providing guidance regarding when § 1252(f)(2) might apply outside the context of stays of removal. Pet. Br. 37. In fact, the quoted language quite clearly references § 1252(f)(1), not (f)(2). *AAADC,* 525 U.S. at 481-82.

Nken concedes that § 1252(f)(2) regulates the power of federal courts to grant injunctive relief, Pet. App. 37-38, but it does not explain how the issue might arise outside the context of a stay of removal pending consideration of the alien's petition for review. The answer is that it cannot arise in any other context, because various other provisions in § 1252 prevent federal courts from even exercising jurisdiction outside the context of a petition for review of a final order of removal. *See, e.g.,* 8 U.S.C. §§ 1252(b)(9) & (g). Nken's only response is that maybe Congress adopted § 1252(f)(2) as a backstop for some exceptional circumstances (not yet identified by anyone) under which §§ 1252(b)(9) & (g) might not prevent the exercise of jurisdiction in other contexts. Pet. Br. 38. Such speculation is too slender a reed to provide a rational explanation for a statute that acquires meaning only if it is interpreted as being applicable to stays of removal.

D. Petitioner's Counter-Arguments Are Without Merit

In support of their position that § 1252(f)(2) does not apply to stays of removal, Nken and his supporting *amici* parrot many of the statutory construction arguments raised by the various appeals courts that support their position. The federal government's brief thoroughly refutes each of those arguments; accordingly, we only touch upon a few of them briefly.

Nken notes that § 1252(f)(1) limits the authority of federal courts to either "enjoin or restrain" altogether the operations of certain immigration laws. In contrast, § 1252(f)(2) employs only the word "enjoin" when limiting the injunctive authority of federal courts with respect to individual immigration cases. Nken argues that a limiting construction must be placed on the word "enjoin," or otherwise the word "restrain" in § 1252(f)(1) would be reduced to mere surplusage. Pet. Br. 17. That argument is a nonsequitor, at least in a case in which Nken is trying to differentiate between the words "enjoin" and "stay," and not between the words "enjoin" and "restrain." *Amici* note that even the Fifth Circuit, which ultimately agreed with Nken's interpretation of § 1252(f)(2), deemed the enjoin/restrain argument unpersuasive. *Tesfamichael v. Gonzales* 411 F.3d 169 (5th Cir. 2005). Moreover, using two largely synonymous words in succession (like enjoin and restrain) does not render one of the words superfluous; Congress could well determine that by repeating similar words, it is better conveying its intent that it really, really means what it says.

Nken also argues that had Congress wanted to

impose a standard for granting stays of removal, it would have done so in § 1252(b)(3)(B) instead of in § 1252(f)(2). That argument is wholly unpersuasive. It is at least as logical to place a standard for when it is proper to enjoin/stay a removal order in the subsection that addresses limits on injunctive relief (§ 1252(f)) as it is to place it in a subsection entitled "Requirements for review of orders of removal" (§ 1252(b)). But even if Nken is correct that § 1252 could have been organized more logically, that observation does nothing to suggest that the words of § 1252(f)(2) should be given anything other than their most natural reading. In any event, both § 1252(b)(3)(B) and § 1252(f)(2) were adopted in 1996 as part of IIRIRA and were placed into the same section – and those circumstances raise a strong inference that the two provisions ought to be read in tandem.

Finally, Nken suggests that if § 1252(f)(2)'s somewhat stricter standard is applied to stays of removal, then at least some aliens with valid asylum claims will be removed to countries where they face great risk of persecution or death. But that risk exists regardless what standard is adopted, unless one reverts to the standard unequivocally rejected by Congress in 1996 – granting stays pending appeal to *all* aliens. More importantly, there are numerous safeguards built into the system – before removal proceedings ever reach the courts – to minimize the danger that those with valid asylum claims will be ordered removed. For example, both the BIA and Immigration Judges are part of the Justice Department and thus are not beholden to immigration enforcement officials within DHS. If an alien against whom removal proceedings have been initiated by DHS has a strong asylum claim, one can

reasonably expect that either the IJ or the BIA will pick up on that fact and grant the claim. Moreover, DHS officials who come to believe that removal poses a serious threat to the safety of an alien also are empowered to exercise their discretion to withhold removal. One can reasonably assume that Congress, when it adopted § 1252(f)(2), concluded that it had taken sufficient steps to minimize that danger and that judicial intervention (in the form of stays of removal) was unnecessary in the absence of unusually strong evidence that DHS had erred.

II. APPLYING § 1252(f)(2) TO STAYS OF REMOVAL IS CONSISTENT WITH THE STRUCTURE AND LEGISLATIVE HISTORY OF IIRIRA

This Court has observed that the overriding "theme" of IIRIRA is a congressional desire to reduce judicial interference with good-faith decisions made by Executive Branch officials with respect to immigration matters. *AAADC*, 525 U.S. at 486. For example, as noted above, IIRIRA placed entire classes of removal decisions beyond the reach of federal court jurisdiction. *See, e.g.,* 8 U.S.C. § 1252(a)(2)(A), (B), & (C); § 1252(b)(4)(D).

That theme recurred in later immigration-related legislation, particularly the REAL ID Act of 2005. That statute, adopted largely in response to the Court's decision in *St. Cyr*, eliminated virtually all habeas corpus jurisdiction over claims raised by aliens facing removal orders. In *St. Cyr* and later decisions, the Court made clear that it will not interpret a statute as eliminating habeas jurisdiction unless the statute

explicitly cites the federal habeas statute, 28 U.S.C. § 2241. *See, e.g., Demore v. Kim*, 538 U.S. 510 (2003). Congress rose to the challenge with the REAL ID Act; that statute added explicit references to 28 U.S.C. § 2241 to virtually every jurisdiction-limiting provision of 8 U.S.C. § 1252.

In light of Congress's manifest desire to protect the Executive's discretion from the courts in the area of immigration enforcement, it makes eminent sense to interpret § 1252(f)(2) as a limitation upon the power of courts to stay removal pending consideration of an alien's petition for review.

Each of the federal appeals courts that has refused to apply § 1252(f)(2) to stays of removal has instead judged stay motions based on that circuit's traditional standards governing the grant of preliminary injunctions. Reported § 1252(f)(2) opinions from those circuits well illustrate the wide disparity in the "traditional" standards that existed in 1996 and that continue to this day. For example, the Ninth Circuit has held that a stay of removal should be granted if the alien demonstrates "either (1) a probability of success on the merits and the possibility of irreparable injury, or (2) that serious legal questions are raised and the balance of hardships tips sharply in the petitioner's favor." *Andreiu v. Ashcroft*, 253 F.3d 477, 483 (9th Cir. 2001) (*en banc*). The Seventh Circuit employs a "sliding scale" approach "under which the more likely it is that the [alien] will succeed on the merits, the less the balance of irreparable harms need weigh toward [his] side" and "the less likely it is the [alien] will succeed, the more he balance need weigh toward [his] side." *Sofinet v. INS*, 188 F.3d 703, 707 (1999). Other circuits

have required aliens to demonstrate *both* likelihood of success on the merits *and* irreparable harm in the absence of a stay. *See,, e.g., Tesfamichael*, 411 F.3d at 171-72.

Congress can be presumed to have been aware, when it adopted IIRIRA, that various federal circuits employed markedly different standards for granting preliminary injunctions. Yet if Nken's interpretation of IIRIRA is correct, Congress intended that the standard for granting stays of removal should follow each circuit's standard for granting preliminary injunctions. It is difficult to believe that Congress, at the same time that it abolished mandatory stays, intended that an alien's stay application would be governed by the unique preliminary injunction standards of the circuit in which he happened to be located.

Moreover, IIRIRA abolished the prior, uniform standard governing all motions for stays of removal (which mandated that noncriminal aliens were entitled to stays in all cases). *See* 8 U.S.C. § 1105a(a)(3) (1994). Thus, § 1252(f)(2) can be deemed inapplicable to stays of removal only if one is willing to assume that Congress intended to abolish the prior standard without specifying what the new standard would be.

As *AAADC* recognized, a court-imposed delay in removal is a victory for the alien; it "permits and prolongs a continuing violation of United States law." *AAADC*, 525 U.S. at 490. Reducing those delays by applying § 1252(f)(2)'s relatively strict standards to stay motions is entirely consistent with Congress's desire to prevent immigration enforcement efforts from being tied in knots.

III. THERE IS NO BASIS FOR INVOKING A PRESUMPTION THAT AMBIGUOUS STATUTES SHOULD BE CONSTRUED IN FAVOR OF AN ALIEN RESISTING DEPORTATION

Nken asserts that ambiguous statutes touching on removal should be construed in favor of the alien resisting deportation. Pet. Br. 19. Nken's efforts to invoke this alleged rule of statutory construction should be rejected for several reasons.

First, the presumption relied on by Nken should be invoked, if at all, only as a last resort in those cases in which normal rules of statutory construction fail to provide any basis for resolving the alleged ambiguity. Here, once those rules of statutory construction are applied, there is no remaining ambiguity. Second, no cases cited by Nken embrace his presumption as a holding; in each case, the Court's discussion is dictum. Third, Nken's presumption makes no sense as an accurate predictor of how Congress would want such issues resolved; to the contrary, all indications are that Congress would wish close cases to be resolved in *favor* of deportation.

The Presumption as a Last Resort. Nken invokes his presumption even before he begins his statutory analysis. Pet. Br. 19-20. But as this Court recently noted, that sort of argument "puts the cart before the horse." *Fernandez-Vargas v. Gonzales,* 126 S. Ct. 2422, 2430 (2006). The Court explained that any presumption favoring aliens facing deportation should be employed, if at all, as a *last* resort, not "as a tool for

interpreting the statute" on a par with other, normally employed interpretive tools. *Id.* Such a presumption could be applicable, if at all, only where Congress's purpose is largely inscrutable. It has no place where, as here, there are numerous *direct* indications of Congress's intent – including all of the analysis set forth in the preceding sections of the brief.

No Full Embrace of the Presumption. In support of invoking a tie-goes-to-the-alien presumption, Nken cites several decisions of this Court over the past 60 years. However, in none of those cases did the Court rely on such a presumption as part of its holding. Rather, only after deciding the cases in favor of the alien did the Court mention the presumption in *dicta*. *See, e.g., INS v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987) (Court overturns denial of asylum claim based on "the plain language of the [INA], its symmetry with the United Nations Protocol, and its legislative history. . . We finds these canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."); *INS v. Errico,* 385 U.S. 214, 225 (1966) (after construing the INA as saving an alien from deportation despite the alien having misrepresented his status to gain entry into the United States, Court adds, "Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."); *Costello v. United States*, 376 U.S. 120, 128 (1964) (Court construes statutory deportation provision in favor of alien, then adds that even if the statute's meaning were in doubt, that doubt should be resolved "in favor of the alien."). Accordingly, despite the Court's occasional reference to the presumption as "longstanding" in

nature, *Dada v. Mukasey*, 128 S. Ct. 2307, 2318 (2008), it has never been fully embraced by the Court as part of a holding in a case.

No Reason to Presume that Congress Wishes Aliens to Prevail in Close Cases. It is worth noting that the presumption that Nken seeks to invoke developed not as a result of any special solicitude for aliens facing deportation, but from a belief that Congress does not normally write irrational statutes. The Court first articulated the presumption in *Delgadillo v. Carmichael*, 332 U.S. 388 (1947), a deportation case that turned on whether petitioner Delgadillo had "entered" the United States within the previous five years; if so, he was subject to deportation. Although Delgadillo had lived continuously in the United States for 20 years, a ship on which he was working was torpedoed along the Florida coast in 1942, and survivors were brought to Havana, Cuba. The government argued that his arrival in Miami, Florida from Havana one week later should be deemed an "entry" for purposes of the relevant deportation statute. In rejecting that interpretation as "capricious," the Court explained:

> [T]he stakes are indeed high and momentous for the alien who has acquired his residence here. We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are asked to subject the alien are too irrational to square with the statutory scheme.

Delgadillo, 332 U.S. at 391. In other words, the courts interpret statutes in a manner that favors aliens facing deportation when not doing so will lead to capricious yet momentous results, not because Congress necessarily intended that aliens be given the benefit of the doubt in close cases.

Later decisions of this Court erroneously pointed to *Delgadillo* as creating a tie-goes-to-the alien rule. But the only rationale put forward in later decisions in support of such a rule was that the consequences of a deportation order are so heavy that it should not be issued in the absence of a clear mandate. For example, in a case involving efforts to deport a man convicted of two murders, the Court said:

> We resolve the doubts in favor of [the] construction [of the deportation statute presented by the alien] because deportation is a drastic measure and at times the equivalent of a banishment to exile, *Delgadillo v. Carmichael*, 332 U.S. 388. . . . [S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

Amici respectfully request that the Court use this case to extinguish the notion that aliens are entitled to special solicitude in deportation proceedings. Justice Douglas was no doubt correct in *Fong Haw Tan* that a deportation decision has major consequences, but that

is not a reason to bias the outcome in favor of one party or the other. The outcome of a deportation proceeding is just as important to society at large as it is to an alien felon facing deportation – the safety of all Americans depends on the government's ability to deport such aliens as quickly as possible.

The guiding principle in construing an immigration statute or any other federal statute is to arrive at an interpretation that best captures congressional intent. *See, e.g., Gade v. National Solid Waste Management Ass'n,* 505 U.S. 88, 98 (1992) ("The purpose of Congress is the ultimate touchstone"). In light of Congress's repeated efforts to restrict the jurisdiction of federal courts to second-guess immigration-related decisions rendered by Executive Branch officials, there is little reason to conclude that Congress adopted those statutes with the intent that close cases should be decided in favor of the alien felon. There may be immigration provisions in which Congress has indicated a desire that the alien be given the benefit of the doubt, but 8 U.S.C. § 1252(f)(2) is not one of them. In light of Congress's repeated efforts to decrease the lag time between entry of a final order of removal and the date on which the alien is finally removed, there can be no basis for maintaining a blanket rule that Congress intended the courts to give the benefit of the doubt to the alien in all deportation cases.

CONCLUSION

Amici curiae Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court affirm the decision of the court of appeals.

Respectfully submitted,

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